

1 Q And those harms include diminished  
2 ad revenues, diminished ability to negotiate  
3 with sports teams?

4 A Correct.

5 Q And also diminished subscriber  
6 fees, correct?

7 A Correct.

8 Q I have a fundamental question for  
9 you. Is it your position that the cost bears  
10 discrimination fees, these harms flow or the  
11 cost fees harms flow, there's discrimination?

12 A I think the first one is  
13 appropriate. These harms flow from the  
14 conduct, the challenged conduct is the  
15 discrimination, is the discriminatory refusal  
16 to deal. That is, if Comcast were to carry  
17 MASN in contested areas, it would be no harm.

18 Q Now MASN is being carried in [REDACTED]  
19 [REDACTED] of its coverage area by Comcast, is  
20 that correct?

21 A Correct.

22 Q That's a substantial amount in

1 your opinion?

2 A Yes.

3 Q And I know Mr. Burke asked you  
4 questions about what amount either below or  
5 above that would affect your analysis, but my  
6 question is is anything less than 100 percent  
7 coverage unacceptable?

8 A It motivation is discrimination it  
9 may be unacceptable. Although, to be  
10 completely fair, if we were back here and we  
11 had the same fact pattern except for Comcast  
12 was denying [REDACTED] of its overlap  
13 territory instead [REDACTED], it would be harder to  
14 satisfy the standard of impaired rival's  
15 ability to compete fairly.

16 Does that -- so as shrink, what I  
17 call the foreclosure share, the harm to MASN  
18 shrinks.

19 Q So does it require 100 percent  
20 coverage in order -- in your opinion, would  
21 there be discrimination if there were anything  
22 less than 100 percent coverage?

1           A       Oh yes, there would be  
2   discrimination. The realm is whether or not  
3   we satisfy the second requirement which is  
4   harm the rival's, impair the rival's ability  
5   to compete fairly, right? So we'd still be  
6   able to prove discrimination.

7                   Comcast has an affiliated network  
8   in the same geographic area competing for  
9   programming, competing for advertisers, right?  
10   I don't think that that would change. I think  
11   that what would be harder to prove and I said  
12   this in my deposition, would be the second  
13   prong which is the impairment to the rival.

14                  Now I'd also just like to point  
15   out that I think it would be in that  
16   hypothetical case, it would be a mistake to  
17   ignore this short history of three years ago  
18   in which Comcast was completely shutting MASN  
19   out from carriage in which case the  
20   foreclosure was 100 percent.

21                  So I call this in my report kind  
22   of "Death by 100 Cuts". We could start this

1 game over again and we could say let's have a  
2 hypothetical where they're shutting us out of  
3 five percent. What if they win that one? Mr.  
4 Orszag would come back and say the five  
5 percent is not significant. I'd have to argue  
6 that five percent was significant and where  
7 will we be?

8 I think the next step would be if  
9 we can renege on this contract or renege on this  
10 what I think is a regulatory compact, let's go  
11 for seven percent. I'll have to come back in  
12 and argue that the incremental two percent is  
13 significant impairment.

14 The point of this is speech number  
15 one for today is that when considering  
16 impairment here, it is important to look at it  
17 in isolation as a first pass. But I also  
18 think it's important to look at it in a larger  
19 context of this dispute.

20 Not very long ago, about three  
21 years ago, Comcast was foreclosing MASN in 100  
22 percent of its territories. That's the end of

1 speech one.

2 Q In your professional opinion, is  
3 all conduct that restrains competition  
4 discriminatory?

5 A No.

6 Q Is there some conduct that  
7 restrains competition not discriminatory?

8 A I'm getting a little confused by  
9 the question. What I should you were going to  
10 say is all conduct and harm's arrival anti-  
11 competitive, but so no, I would -- can you  
12 repeat the question, I just want to make sure  
13 I have it clear in my head.

14 Q The first question was is all  
15 conduct that restrains competition  
16 discriminatory?

17 A I want to say no, but I'd want to  
18 think about examples. So a counter example  
19 would be conduct that restrains competition  
20 but is not motivated for discriminatory  
21 reasons. I'm sure we can come up with some.

22 So I see the discriminatory aspect

1 coming first in the application of the  
2 statute. Can we establish that the  
3 noncarriage decision was based on  
4 discrimination? Then the next step is can we  
5 establish that it impaired the rival's ability  
6 to compete fairly.

7 The way you're asking the question  
8 is kind of going in reverse.

9 Q So is there some conduct that  
10 restrains competition that is not considered  
11 discriminatory?

12 A That is not motivated for  
13 discriminatory reasons? Yes, I think that I  
14 can come up with an example. I don't know if  
15 I can do it on the fly here of conduct that  
16 would restrain competition. But it's not  
17 done, it's not motivated in a way to -- now I  
18 can -- not motivated in a way to prop up or  
19 support someone in your family.

20 So if you have a case that  
21 involves no vertical integration, let's just  
22 step out of this case and say if a monopolist

1 engages in conduct that harms a rival, it may  
2 not be doing it because it's trying to favor  
3 some upstream division. It just might have  
4 sufficient power to harm the rival.

5 Q Well, let's take the example of  
6 the vertically integrated entity like Comcast  
7 for example. Is there any type of conduct  
8 that Comcast can engage in which restrains  
9 competition, but is not discriminatory?

10 A I think the answer is yes. I  
11 think that we can probably come up with  
12 conduct, given Comcast's downstream market  
13 power. It's conceivable to me that we would  
14 come up with a type of conduct that restrains  
15 competition, but is not done to prop up its  
16 upstream affiliate.

17 Q So what you're looking then is  
18 motive, rather than effect?

19 A Yes, I think the first prong of  
20 this -- what I consider the two elements of  
21 proof that MASN just establish here and the  
22 first one is that discrimination was done on

1 a basis of affiliation. That goes to motive.  
2 Why are they not carrying? And the second  
3 prong goes to the associated competitive  
4 effect, associated with the discriminatory  
5 conduct.

6 Q What if we disregarded motive  
7 completely. How would that affect your  
8 analysis?

9 A I think it would be hard to  
10 understand the story. It would be hard to  
11 understand what's going on. I mean the  
12 favorite question that an economist asks or  
13 answers is what's the incentive? What are  
14 they up to? So if you took away the motive to  
15 an economist, it would be pretty crippling.

16 JUDGE SIPPEL: Just a blunder, a  
17 massive mistake. Like not building the right  
18 cars at the right time, something like that.

19 (Laughter.)

20 THE WITNESS: Don't get me  
21 started.

22 (Laughter.)



1 BY MR. SCHONMAN:

2 Q I've read through your direct  
3 testimony. I've heard a lot of your oral  
4 testimony, but why do you think there's  
5 discrimination in this particular case?

6 A I think that Comcast still has not  
7 gotten over the fight from three years ago.  
8 I think that the battle was very contentious  
9 over the Nationals' rights, as I'm sure you  
10 recall. Comcast, somebody said yesterday, I  
11 take this stuff too emotionally. Comcast took  
12 it religiously. They said that they believe  
13 that the assignment of Major League Baseball  
14 of the Nationals' rights to the Orioles was  
15 quote original sin. That's pretty strong  
16 words in a press for them to say that.

17 I think that to understand what's  
18 going on here without acknowledging where we  
19 came from three years ago is a big mistake and  
20 so I think that this is a continuation of a  
21 discriminatory strategy, and I think it is  
22 blatant retaliation.

1           Q       Maybe I asked the question the  
2 wrong way. I'm looking for, in terms of your  
3 economic analysis, why you think there's  
4 discrimination.

5           A       Sure. I can tell you that.

6           Q       Can you tell me theoretically how  
7 is discrimination established? In my next  
8 question, I'll ask you how it is established  
9 in this case?

10          A       So how you establish -- what does  
11 an economist have to say about the first  
12 prong, about discrimination?

13          Q       What do you say?

14          A       Right, right. That's what I said  
15 in my testimony. I am trying it from an  
16 economic perspective in form the first  
17 question which is is the motivation here  
18 discrimination.

19          Q       My question for you is as an  
20 economist, how do you establish whether or  
21 whether there is not discrimination? That's  
22 my first question.

1           A       I want to see if it makes sense to  
2   discriminate here. Do they have something to  
3   protect? Do the two upstream networks compete  
4   in some meaningful way? Can they make money  
5   by it? Is there an incentive there for them  
6   to do it? Do they have the ability? Do they  
7   have the downstream market power to engage in  
8   such foreclosure and make it hurt?

9                   And then finally you would want to  
10   see if there are any good, compelling business  
11   justifications for not caring.

12          Q       In this case, why do you believe  
13   there's discrimination from -- according to  
14   your economic analysis?

15          A       Sure. Well, just as -- I'll go  
16   right back through the prongs. I tried to see  
17   if there was an incentive and an ability from  
18   the incentive perspective, you say is there  
19   something to prop up? Is there some reward to  
20   Comcast for engaging in this sort of behavior?  
21   Right?

22                   Well, they carry a rival sports

1 network in the same geographic area, competing  
2 for the same programming rights. So if you  
3 can do something in a way to disadvantage your  
4 rival, that's pretty strong motivation and we  
5 have, I think, very compelling anecdotes in  
6 this case about competition for the Redskins  
7 pre-season, competition for the Ravens pre-  
8 season. We can go on and on. The competition  
9 started with the Orioles and then it followed  
10 with the Nationals. But these guys are as  
11 close as you can get in product space in my  
12 opinion.

13 JUDGE SIPPEL: Who?

14 THE WITNESS: MASN and Comcast  
15 Sports Net.

16 JUDGE SIPPEL: As close as you can  
17 get?

18 THE WITNESS: In product space.  
19 What I mean by that is that -- I don't like to  
20 use the word ex ante and ex post competition,  
21 and I hope that's not confusing. Let me  
22 explain to you what I mean. Ex ante, both

1 networks are going about the Nationals.  
 2 Right? Ex ante, both networks are going after  
 3 the Ravens. Ex ante, both networks are going  
 4 after the Redskins. I could go on and on. Ex  
 5 ante, both networks are going after D.C.  
 6 United. Ex post, you end up with some and I  
 7 end up with the others and then we can have  
 8 what I think is a half-informed argument as to  
 9 whether or not what we ended up with ex post  
 10 is close in product space. And it is here.

11 I'm showing the Phillies in  
 12 Harrisburg. Just to make it concrete,  
 13 Harrisburg is shared territory for both the  
 14 Phillies and the Orioles. So one network  
 15 shows the Orioles in Harrisburg, a distant  
 16 place, but nevertheless inside its footprint.  
 17 And another network shows the Orioles. I said  
 18 Orioles first, but I'm getting tired. They  
 19 both show or one shows Orioles, one shows  
 20 Phillies. That's an ex post comparison.

21 But an ex ante, on an ex ante  
 22 basis, these guys are competing for the very

1 same programming in which case the degree of  
2 interchangeability is perfect.

3 BY MR. SCHONMAN:

4 Q In your opinion, in a vertically  
5 degraded entity, does one have the ability and  
6 the incentive to engage in anti-competitive  
7 behavior that does not constitute  
8 discrimination, but not have discrimination?

9 A It's conceivable we could come up  
10 with a counter example. My inclination is to  
11 say no. In the general case, you're going to  
12 probably find some discrimination in any  
13 example that you come up with to satisfy the  
14 incentive and the ability, parts of your  
15 question.

16 Q There was a lot of testimony about  
17 the demand for MASN programming in the  
18 disputed areas. And the question I have for  
19 you is isn't Comcast or wouldn't Comcast be  
20 shooting itself in the foot, so to speak, if  
21 there was such high demand for the O's games  
22 and the Nats games in the Harrisburg area and

1 they declined to carry that programming?  
2 Wouldn't the viewers demand Comcast carry it?

3 A They are. This is what is  
4 surprising. It may not be intuitive, but the  
5 whole purpose of an anti-discriminatory  
6 refusal to deal is motivated to prop up your  
7 upstream rival is that you're willing to trade  
8 downstream losses which could be significant  
9 for even bigger upstream gains.

10 So let me just use an example.  
11 Imagine ask the question why is Comcast not  
12 carrying the Washington Nationals in  
13 Washington? Doesn't that upset their  
14 customers? Darn straight it does. Are they  
15 losing money as a result? Is the downstream  
16 division suffering as a result? Darn straight  
17 it is. Okay? But these guys are motivated  
18 for other reasons. It's the notion that they  
19 can one day control those rights with their  
20 upstream division.

21 In other words, a part of the  
22 discrimination strategy is to sacrifice gains

1 in one -- sacrifice revenues in one division  
2 in exchange for hopefully, even off-setting  
3 larger gains in other division.

4 Q Something akin to short-term  
5 goals/long-term goals?

6 A I don't know if it requires a  
7 short-term sacrifice. It might, but it  
8 doesn't always have to involve a short-term,  
9 but I can see how you put it that way.

10 Q Did your economic analysis  
11 consider why Harrisburg and the Tri-Cities and  
12 Roanoke/Lynchburg as opposed to other  
13 communities that Comcast might have created  
14 gaps in MASN's programming?

15 A You know, the gaps cannot be  
16 accidental. Right? If you believe in MASN's  
17 theory of the case, right? I don't think that  
18 you would kind of randomly, if you were  
19 engaged in discrimination, I don't think that  
20 you would randomly blow a hole in [REDACTED]  
21 of your coverage space. So there is something  
22 important and I've asked, I've had



1 conversations with folks at MASN on this point  
2 and the one thing that I think we can all  
3 conclude is that if Comcast were to blow a  
4 hole in the core of MASN's territory --

5 Q You mean in Washington?

6 A In Washington, yes, it would be so  
7 blatant, considering where we just came from  
8 three years ago, right, where we got the  
9 Commission basically to intervene. It would  
10 be so blatant and so obviously destructive,  
11 that they couldn't get away with it.

12 Q What's your point?

13 A My point is that if you're going  
14 to  
15 -- you're now constrained by a few things.  
16 You're constrained by regulatory intervention.  
17 You're partially constrained by a contract and  
18 I'm not going to opine any further on that.

19 And yet, you want to advantage  
20 your affiliate, but it has to be done in a  
21 subtle way because if it's blatant, then  
22 you're going to be slapped down. So I think

1 that explains where the [REDACTED] is. But  
2 beyond that, I can't -- Harrisburg is a AA  
3 affiliate to the Nationals.

4 So this hurts, hurts particularly  
5 because what the Nationals want to do, you  
6 don't need a Ph.D. in economics to figure this  
7 out, right? They want to cultivate fans of  
8 the Harrisburg Senators, the AA team to  
9 hopefully become fans of the Nationals, right?  
10 You're watching a kid grow up in the AA  
11 affiliate and you want to see him progress to  
12 the majors. You say that's my boy. You take  
13 your family to Washington, you watch a game.

14 I think that not carrying MASN in  
15 Harrisburg interferes and undermines that  
16 natural progression of fan interest.

17 Q Why Tri-Cities and  
18 Lynchburg/Roanoke?

19 A Now we're finding out ex post that  
20 happens to be very important to the Redskins.  
21 The Redskins, we're seeing a pattern here,  
22 right? These professional sports teams are

1 given these territories from on high and it's  
2 an easy sell for them to indoctrinate the fans  
3 in the neighboring territories, but what they  
4 want to do is they want to push the frontiers  
5 and they want to get people a little farther  
6 away from the venue excited. The Redskins  
7 made it very clear to MASN that they consider  
8 fans or perspective fans in Tri-Cities and  
9 Roanoke to be very important to their -- the  
10 way that they're going to grow the value of  
11 the franchise.

12 Q So it's your professional opinion  
13 that Comcast deliberately chose these  
14 particular markets to deny MASN programming?

15 A I think if they were, and I  
16 believe they're motivated for discriminatory  
17 reasons. I think that the next logical step  
18 is that they didn't just put a bandanna over  
19 their eyes and throw darts at the wall.  
20 Right? There's got to be something to these

21 [REDACTED] Yes, I do.

22 Q Could bandwidth have been that

1 certain thing in selecting these markets?

2           A       Apparently not according to the  
3 testimony that you're about to hear from Mr.  
4 Ortman for Comcast who says that as soon as  
5 you have 500 megahertz, it's sufficient. And  
6 I don't think that these properties, number  
7 one, are all below 500. Number two, even if  
8 some of them are below 500, Comcast made a  
9 commitment we heard yesterday or the day  
10 before to the FCC that they're going to have  
11 part of this, part of the pro-competitive  
12 effects of allowing us to keep growing our  
13 footprint, is that we're going to upgrade  
14 these systems.

15           Q       In conducting your economic  
16 analysis, did you consider bandwidth as one of  
17 the elements to consider in determining  
18 whether there was discrimination or not?

19           A       Well, this was an efficiency  
20 defense, right, that was put forward by  
21 Comcast's economic expert. I was curious only  
22 because -- I'll put it in terms of myself

1 instead of Mr. Orszag. As an economist, I  
2 don't know how much I can add from an  
3 engineering or a technical perspective as to  
4 whether or not capacity is really an issue.

5 Q So it was not part of your  
6 analysis?

7 A Well, I certainly considered it.  
8 Because this was their -- this was one of  
9 their efficiency defenses. So I've considered  
10 it.

11 Q So it was part of your analysis?

12 A Yes, yes. The way that I think  
13 the burden shifts here is that if there is a -  
14 - we don't even get to efficiency defenses  
15 until there is a finding or proof or hard  
16 evidence that we have discriminatory conduct  
17 here in a similarly situated and all this  
18 stuff. I don't think you put the efficiency  
19 thing at the top. The efficiency defense  
20 comes at the bottom and they've raised the  
21 issue.

22 I've investigated the issue as

1 much as an economist can do. I mean after I'm  
2 told that a Comcast employee says that 500 is  
3 enough and most of these properties have 500  
4 megahertz and I guess the only thing that I  
5 can offer as an economist is that that 500 is  
6 a static number. We're not going to be at 500  
7 forever. If you're below the 500, if you're  
8 at 450 or you're at 400, you're not locked  
9 there forever, right? If there's demand for  
10 product, if you want to offer innovative, new  
11 services, high-speed internet and the like,  
12 you expand your bandwidth.

13 Q If bandwidth was a problem in any  
14 or all or some of these three markets, and  
15 that constituted a legitimate reason for not  
16 carrying MASN in these areas, would that belie  
17 the nefarious reasons that you've established  
18 for discrimination?

19 A Belie is a tough word. It would  
20 certainly have to be balanced against evidence  
21 that it was motivated for anti-competitive  
22 reasons. But the problem that I guess I'm --

1 and then there's the question of how good is  
2 the evidence of the capacity constraint? And  
3 how compelling is it to an economist?

4               So let me just start back on the  
5 first point. I don't think that they've put  
6 forward good evidence of capacity constraint  
7 in my opinion. Okay, there's no concrete  
8 citations in Mr. Orszag's direct testimony  
9 that convince me that capacity is an important  
10 issue.

11              Number two, like I said, capacity  
12 isn't permanent. Even if there's a system in  
13 Tri-Cities that's at 400, and 500 is the magic  
14 number, according to Ortman in which case you  
15 don't have capacity constraint, there's no  
16 reason why 400 has to be locked into the place  
17 forever.

18              If I could, I'm sorry, and number  
19 three is that even if you were capacity  
20 constrained, it's still conceivable that MASN  
21 would constitute more valuable programming for  
22 you on net than the least valuable programming

1 you're currently carrying. Okay, so let's  
2 talk about -- let's pick something that I hope  
3 we can --

4 Q You lost me on the last one.

5 A Watch this. Imagine I say I'm  
6 capacity constrained and that's why I don't  
7 want you, but at the same time and I'm just  
8 going to make up a statement. I'm carrying  
9 CNET 17, you know, what's the -- C-SPAN 3  
10 which is a video camera in the room next door  
11 recording an empty hearing at the FCC, right?  
12 And I tell you that I'm capacity constrained.  
13 What that effectively is saying is that you're  
14 not more valuable to me than my least valuable  
15 network that's clogging up the last station.

16 Q So if they wanted to make room,  
17 they could have, is that what you're saying?

18 A I'm saying that even in the case  
19 of a capacity constraint, it would be hard for  
20 me to believe that the least valuable program  
21 that's taking up one of these valuable slots  
22 could be more valuable than a regional sports



1 network.

2 Q Are you saying that bandwidth is  
3 never a legitimate justification for denying  
4 carriage?

5 A I don't want to say never. That's  
6 a strong word. It certainly could be given  
7 the right fact pattern. It could be.

8 Q A moment ago you mentioned a  
9 contract and I know you indicated you didn't  
10 want to go in that direction, but I'd like to  
11 go in that direction. To what extent did you  
12 consider the existence of a contract in  
13 conducting your economic analysis?

14 A I think Mr. Kim asked me this  
15 exact question, right, during my direct.

16 Q That was yesterday.

17 (Laughter.)

18 Today is a new day.

19 A My answer is the same as  
20 yesterday.

21 Q What was that?

22 A It didn't weigh in. I can say it